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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 JAMES BYRON,

10 Plaintiff,

11 v.

12 INSTITUTE FOR ENVIRONMENTAL
13 HEALTH, INC.,

14 Defendant.

Case No. C18-1415RSL

ORDER DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

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16 This matter comes before the Court on defendant Institute for Environmental
17 Health, Inc.'s ("IEH") motion for summary judgment. Dkt. #30. Summary judgment is
18 appropriate where, taking the facts in the light most favorable to the nonmoving party,
19 there is no dispute of material fact that would preclude judgment as a matter of law. The
20 moving party "bears the initial responsibility of informing the district court of the basis
21 for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). That party must also
22 cite "to particular parts of materials in the record that show the absence of a genuine issue
23 of material fact." Fed. R. Civ. P. 56(c). That party is entitled to summary judgment if the
24 non-moving party fails to identify "specific facts showing that there is a genuine issue for
25 trial." *Celotex Corp.*, 477 U.S. at 324. The Court will "view the evidence in the light most

1 favorable to the nonmoving party . . . and draw all reasonable inferences in that party's
2 favor." *Krechman v. Cnty. of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013). Although
3 the Court must reserve for the jury genuine issues regarding credibility, the weight of
4 evidence, and legitimate inferences, the "mere existence of a scintilla of evidence in
5 support of the non-moving party's position will be insufficient" to avoid judgment. *City*
6 *of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014). Summary
7 judgment should be granted where the nonmoving party has failed to offer evidence from
8 which a reasonable jury could return a verdict in its favor. *FreecycleSunnyvale v.*
9 *Freecycle Network*, 626 F.3d 509, 514 (9th Cir. 2010).

10 Having reviewed the parties' memoranda, declarations, and exhibits,¹ and taking
11 the evidence in the light most favorable to plaintiff, the Court finds as follows:

12 BACKGROUND

13 IEH is a private company that provides, *inter alia*, laboratory testing services for
14 the food industry. Dkt. #30 at 1. Plaintiff James Byron worked for IEH as a salesman
15 from February 2010 until his employment was terminated in October 2011. Dkt. #43 at 2.
16 In August 2011, Mr. Byron told his supervisor, Dr. Mansour Samadpour, that he thought
17 a particular client would prefer that IEH test three sets of twenty-five samples of their
18 product, significantly more than the number that had been proposed by IEH scientists.
19 Dkt. #60-4. Dr. Samadpour replied that Mr. Byron's suggestion was inconsistent with
20 industry guidelines. *Id.* Shortly thereafter, Dr. Samadpour terminated Mr. Byron's
21 employment.

22 Mr. Byron filed an administrative action with the Occupational Safety and Health
23 Administration ("OSHA") alleging that his termination was in retaliation for Mr. Byron's
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25 ¹ The Court has not considered objectionable materials discussed at the end of this Order.

1 expressed concern that some of IEH’s food sample testing procedures relied on an
2 insufficient number of samples. *See* Dkt. #47-1. The OSHA complaint invoked the
3 whistleblower provision of the federal Food Safety Modernization Act (“FSMA”), which
4 generally protects employees in the food and drug industries from retaliation for opposing
5 conduct they reasonably believe violates the Food, Drug, and Cosmetic Act (“FDCA”).
6 *Id.* The FDCA regulates food and drug processing, production, and testing. *See* 9 U.S.C.
7 §341 *et seq.*

8 In the administrative proceeding, the Administrative Law Judge (“ALJ”) granted
9 IEH’s motion to dismiss Mr. Byron’s complaint on the ground that FSMA’s
10 whistleblower protections did not cover IEH employees. *Id.* at 3; Dkt. #47-3 at 1. Mr.
11 Byron appealed, and the Administrative Review Board reversed and remanded, finding
12 that IEH is subject to FSMA. Dkt. #47-1 at 11. IEH then requested that the ALJ dismiss
13 Mr. Byron’s claim because (a) his communications did not qualify as protected activity
14 and (b) IEH would have dismissed Mr. Byron even in the absence of his communications
15 for other, legitimate reasons. Dkt. #47-3 at 3. The ALJ denied the motion, identifying
16 continuing disputes of material fact with respect to whether or not Mr. Byron engaged in
17 protected activity and whether or not IEH would have fired Mr. Byron regardless of any
18 protected activity. *Id.* at 12.

19 Mr. Byron filed this action seeking *de novo* review of his FSMA claim. *See* Dkt.
20 #1. Mr. Byron again alleges that IEH unlawfully terminated his employment in retaliation
21 for expressing his concerns about IEH’s testing process in violation of § 402 of FSMA.
22 Dkt. #1 at ¶¶ 46-47, 72-89. IEH seeks dismissal of the claim on the ground that plaintiff’s
23 communications about his concerns were not protected activity. Dkt. #30 at 8. In its reply
24 memorandum, IEH raises a number of evidentiary objections to a declaration Mr. Byron
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submitted when opposing the motion for summary judgment. Dk. #53 at 12-13.

DISCUSSION

A. Retaliation under FSMA.

Mr. Byron argues that his reports to IEH regarding the insufficiency of IEH's testing procedures constituted protected activity under FSMA. Dkt. #1 at ¶¶ 73-89.

FSMA's employee protection provision provides, in relevant part, that,

"No entity engaged in the . . . processing . . . of food may discharge an employee . . . because [he] provided . . . to the employer . . . information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of [the FDCA] or any order, rule, regulation, standard, or ban under [the FDCA]. . . ."

21 U.S.C. § 399d(a). FSMA specifically protects employees who give information to their employer about conduct they "reasonably believe" violates the FDCA. 21 U.S.C.

§399d(a)(1). The implementing regulations for FSMA's whistleblower protections also adopt the "reasonable belief" standard. 29 C.F.R. § 1987.102(b). There are few cases in which the anti-retaliation provision of FSMA has been interpreted and applied, but the consensus is that the whistleblower provision extends to employees who report or oppose what they reasonably believe to be unlawful conduct, even if the conduct is not, in fact, unlawful. *See Singletary v. Howard Univ.*, 939 F.3d 287, 296 and n.2 (D.C. Cir. 2019); *Ortiz v. Priority Healthcare Group LLC*, 2019 WL 3240016, at *7 (M.D. Pa. July 18, 2019); *Chase v. Brothers Int'l. Food Corp.*, 3 F. Supp.3d 49, 54 (W.D.N.Y. 2014). The ALJ in the underlying administrative action similarly concluded that FSMA's anti-retaliation provision applies where the employee has a reasonable belief that the employer's conduct violated relevant law. Dkt. #47-3 at 6.

Having reviewed FSMA's statutory language and the standards for stating a claim

1 of retaliation against employers in other areas of federal law, the Court adopts the Ninth
2 Circuit’s formulation of a *prima facie* case of retaliation under the Sarbanes-Oxley Act of
3 2002 (“SOX”), 18 U.S.C. § 1514A. Pursuant to that formulation, plaintiff must show that:
4 “(1) he engaged in protected activity or conduct; (2) his employer knew . . . that he
5 engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4)
6 the circumstances were sufficient to raise an inference that the protected activity was a
7 contributing factor in the unfavorable action.” *Tides v. The Boeing Co.*, 644 F.3d 809, 814
8 (9th Cir. 2011).² Although an employee need not prove that the employer’s conduct was,
9 in fact, unlawful in order to satisfy the protected activity element of the *prima facie* case,
10 he must show that his belief that the employer acted unlawfully was reasonable. *See*
11 *Rocheleau v. Microsemi Corp., Inc.*, 680 F. App’x 533 (9th Cir. 2017) (employee not
12 entitled to whistleblower protections where her belief that employer’s conduct was
13 unlawful was unreasonable). *See also Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268
14 (2001) (employee’s complaint of harassment was not protected activity because no
15 reasonable person could have believed that a single sexualized joke was unlawful
16 discrimination).

17 **1. The twofold “reasonable belief” standard.**

18 Establishing that an employee had a “reasonable belief” that he or she was
19 opposing unlawful conduct involves a twofold showing. First, the employee must show

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21 ² This standard is very similar to that adopted by the District Court for the Middle District of
Pennsylvania in *Chase*:

22 “. . . to state a claim for retaliation under the FSMA, a plaintiff must establish (1) participation in
23 a protected activity known to the defendant; (2) an employment action disadvantaging the
24 plaintiff or action that would dissuade a reasonable worker from exercising protected rights under
the FSMA, and (3) a causal connection between the protected activity and adverse action.”

25 3 F. Supp.3d at 54.

1 that he subjectively believed that the employer's conduct was unlawful at the time.

2 Second, the employee's subjective belief must have been objectively reasonable. *See Van*
3 *Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1000-1001 (9th Cir. 2009) (SOX); *Rochelau*,
4 680 F. App'x at 535 (SOX); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. at 271
5 (employment discrimination).

6 **a. Subjective Belief**

7 IEH argues that, because Mr. Byron did not communicate to anyone at IEH that he
8 believed its conduct violated the FDCA, he did not have a subjective belief that he was
9 opposing unlawful (as opposed to merely suboptimal) conduct at the time. *Id.* at 20-23.
10 Mr. Byron acknowledges that he did not communicate his belief that IEH was violating
11 the FDCA. Nevertheless, he asserts that he believed IEH "was violating the law and/or
12 conducting itself in a manner that presented food safety risks." Dkt. #43 at ¶24. He argues
13 that his experience in the industry, his familiarity with the FDCA, and the liabilities
14 associated with defective food products led him to the reasonable conclusion that IEH had
15 an obligation to the public to use sample sizes that would guarantee trustworthy results
16 and that the FDCA regulated these procedures. *Id.* at ¶¶ 33-36. An employee's testimony
17 that he suspected the conduct complained of violated the law at the time is evidence of his
18 subjective belief and is generally sufficient to raise a genuine issue of fact regarding that
19 element of the claim. *See Van Asdale*, 577 F.3d at 1002 (concluding that plaintiff's
20 testimony regarding her subjective "belief that an investigation [into shareholder fraud]
21 needed to occur" was sufficient to reverse summary judgment in the employer's favor).

22 **b. Objective Belief**

23 IEH points out that there are no specific sample size requirements for food testing
24 in the FDCA and therefore argues that Mr. Byron's asserted belief that IEH's testing
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1 protocols were unlawful was objectively unreasonable. Dkt. #30 at 18. “[A]n employee
2 need not cite a code section he believes was violated to trigger [whistleblower]
3 protections,” however. *Van Asdale*, 577 F.3d at 997 (citing *Welch v. Chao*, 536 F.3d 269,
4 274 (4th Cir. 2008)) (internal quotations omitted). “An erroneous belief that an employer
5 engaged in an unlawful employment practice is *reasonable*, and thus actionable . . . if
6 premised on a mistake made in good faith.” *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir.
7 1994) (emphasis in original). A belief is objectively reasonable when “a reasonable
8 person with the same training and experience as the employee would believe that the
9 conduct implicated” violates the law. *Wiest v. Lynch*, 710 F.3d 121, 132 (3d Cir. 2013)
10 (citing *Sylvester v. Paraexel Int’l LLC*, ARB 07-123, 2011 WL 2165854 at *11 (Dep’t of
11 Labor May 25, 2011) (en banc)).

12 Mr. Byron was hired as a salesman with food industry experience, but is neither a
13 scientist nor a regulatory expert. *See* Dkt. #30 at 4, 7; Dkt. #47 at 7-9. Mr. Byron was
14 aware that other IEH employees with scientific training, such as Dr. Jaspreet Sidhu, had
15 expressed their own concerns about IEH’s testing procedures. *Id.* at 11-12.³ Mr. Byron
16 also suggests that his discussions with other scientists employed by IEH regarding their
17 concerns about IEH’s procedures show that his belief was reasonable. *Id.* at ¶28. As
18 discussed above, a mistaken belief that the activity was unlawful is still protected activity
19 if the belief were in good faith and reasonable under the circumstances. *Moyo*, 40 F.3d at
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21 ³ IEH asserts that Dr. Sidhu’s testimony “directly refuted” Mr. Byron’s account of his
22 conversation with Dr. Sidhu. Dkt. #53 at 13. However, in his deposition, Dr. Sidhu said he did
23 not recall the conversation with Mr. Byron but explained that he was not asserting that the
24 conversation never took place. Dkt. #53-1 at 6. While Dr. Sidhu’s testimony certainly does not
25 resolve the issue in Mr. Byron’s favor, neither does it “directly refute” Mr. Byron’s account of
26 events, as IEH insists. At best, the content of Dr. Sidhu’s conversations with Mr. Byron is
disputed.

1 984. IEH has not offered evidence that Mr. Byron’s mistaken belief was in bad faith.

2 **2. *Prima Facie* Case**

3 A plaintiff’s burden of proof at the *prima facie* stage is minimal. *Aragon v.*
4 *Republic Silver State Disposal*, 292 F.3d 654, 660 (9th Cir. 2002). Taking the facts in the
5 light most favorable to Mr. Byron, the non-moving party, there is a genuine issue of fact
6 as to whether Mr. Byron’s communications with his former employer were protected
7 activity for the purposes of FSMA’s whistleblower protections. There is ample evidence
8 that the employer was aware of plaintiff’s opposition and that plaintiff suffered an
9 unfavorable personnel action, satisfying the second and third elements of a *prima facie*
10 case. Finally, the temporal proximity between Mr. Byron’s alleged protected activity and
11 his termination was sufficiently close to support an inference of retaliation at this stage of
12 the proceeding. *Dawson v. Entek Int’l.*, 630 F.3d 928, 937 (9th Cir. 2011).

13 **B. IEH’s Evidentiary Objections**

14 IEH moved to strike portions of Mr. Byron’s declaration submitted in support of
15 his opposition to IEH’s motion for summary judgment (“Byron Declaration” or “Byron
16 Decl.”). *See* Dkt. #53 at 12-13. IEH argues that Mr. Byron’s description of his
17 qualifications as a food industry salesperson “purports to be an expert opinion.” *Id.* IEH
18 argues that, since plaintiff has not identified himself as an expert, he cannot offer his
19 opinions to “create a sham issue of fact.” *Id.* A party cannot use a declaration that
20 contradicts the record to manufacture an issue of fact. *Radobenko v. Automated*
21 *Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). There is no indication that Mr.
22 Byron is attempting to do that here, however. Mr. Byron’s description of his industry
23 experience is in response to IEH’s description of his qualifications. *See* Dkt. #30 at 4.
24 Moreover, his experience is relevant to his whistleblower claim, which requires that he

1 demonstrate that his belief was objectively reasonable for someone with his training and
2 experience. *Weist*, 710 F.3d at 132. Therefore, his statement beginning, “[a]s someone in
3 the food industry . . .” describes his subjective belief based on his training and does not
4 purport to offer an expert opinion. Byron Decl. at ¶36. IEH’s motion to strike that portion
5 of ¶36 of the Byron Declaration is denied.

6 IEH also argues that Mr. Byron’s declaration contains statements that are
7 conclusory, unsupported, or that contradict the record. The Court evaluates each of these
8 arguments in turn. IEH first contends that Mr. Byron’s assertion that Dr. Samadpour had
9 never expressed concerns about Mr. Byron’s performance to him is contradicted by
10 Exhibits M, R, S, and T to the Bouchard Declaration. However, those exhibits are emails
11 from Mr. Byron to Dr. Samadpour, and none of them contains any expression of
12 disapproval by Dr. Samadpour’s of Mr. Byron’s performance. The motion to strike ¶15 of
13 the Byron Declaration is denied.

14 Second, IEH suggests Mr. Byron’s account of his conversation with Dr. Sidhu is
15 “directly refuted” by Dr. Sidhu’s testimony. Dkt. #53 at 13. As discussed in footnote 4,
16 however, Dr. Sidhu testified that he did not recall the conversation and has not refuted
17 Mr. Byron’s account. Even if Dr. Sidhu’s testimony did conflict with Mr. Byron’s, a
18 conflict in witnesses’ testimony is not grounds to strike. IEH’s motion to strike ¶18 of the
19 Byron Declaration is therefore denied.

20 Third, IEH seeks to strike Mr. Byron’s description of his conversation with Mr.
21 Van Arsdale on the ground that it is an unsupported, “conclusory statement based on
22 inadmissible hearsay.” *Id.* Mr. Byron’s conversation with Mr. Van Arsdale is not hearsay
23 because it is not offered for its truth, but instead for its effect on the listener. *U.S. v.*
24 *Connelly*, 395 F. App’x 407, 408 (9th Cir. 2010). Mr. Byron does not include his
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1 conversation with Mr. Van Arsdale to prove the validity of Mr. Van Arsdale's concerns,
2 but rather to explain the events that informed his beliefs about IEH's alleged unlawful
3 activity. Mr. Byron does not, however, offer any factual support for his conclusions about
4 Mr. Van Arsdale's motives in not reporting his concerns. Byron Decl. at ¶20. While a
5 witness may communicate his or her inferences about others' reactions or emotions based
6 on surrounding facts, this conclusory statement about Mr. Van Arsdale's motivations is
7 offered without any factual basis that could support such an inference. The Court grants
8 IEH's motion to strike the following sentence from Mr. Byron's Declaration: "Yet it was
9 clear to me that Mr. VanArsdale [sic] was unwilling to risk Dr. Samadpour's wrath by
10 sharing his concerns." *Id.*

11 Fourth, IEH takes issue with Mr. Byron's characterization of Dr. Samadpour's
12 performance of the sample testing as "a clear conflict of interest that compromises any
13 scientific intent" *Id.* at ¶28; Dkt. #53 at 13. IEH argues that this is conclusory and
14 that it purports to be an expert opinion. *Id.* Because Mr. Byron presents this statement as
15 objective truth unsupported by facts or expert testimony, the motion to strike the
16 following phrase "a clear conflict of interest that compromises any scientific intent of
17 unbiased, impartial, objective, competent review of the study results" is granted. Byron
18 Decl. At ¶28.


19 Finally, IEH moves to strike Mr. Byron's testimony indicating that he had
20 researched legal doctrines in response to IEH's lawyer's questions because it contradicts
21 earlier testimony that his lawyer asked him to do the same research. Dkt. #53 at 13. Mr.
22 Byron does not mention instructions from his attorney to research legal doctrines in his
23 declaration, but this omission is not a contradiction. There is nothing inconsistent with
24 doing research in response to requests from both his and IEH's attorneys. That he omitted
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1 one of those requests in his declaration does not make other testimony inadmissible where
2 there is no inherent conflict. The motion to strike ¶33 of the Byron Declaration is denied.

3 **CONCLUSION**

4 Defendant IEH's motion for summary judgment is denied. There remain disputed
5 issues of material fact regarding whether plaintiff's complaints were protected activity
6 under the Food Safety Modernization Act. Defendant IEH's motion to strike portions of
7 Mr. Byron's Declaration is granted in part and denied in part.
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10 Dated this 19th day of December, 2019.

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12 _____
13 Robert S. Lasnik
14 United States District Judge
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